

12329
No. ~~11,323~~

IN THE
United States Court of Appeals
For the Ninth Circuit

GETCHELL MINE, INC. (a corporation),
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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**STATEMENT OF PLEADINGS AND FACTS DISCLOSING
JURISDICTION OF DISTRICT COURT AND OF THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT ON APPEAL.**

This action was commenced by Getchell Mine, Inc., a corporation incorporated under the laws of the State of Nevada, as plaintiff (hereinafter referred to as appellant), against the defendant the United States of America (hereinafter referred to as appellee), by the filing of a complaint on the 1st day of March, 1947, in the District Court of the United States for the District of Nevada (R. 2). The complaint alleges that the action was brought against the appellee by virtue of the provisions of section 41 (20) of Title 28, United States Code, and, further, that it arises under the

Internal Revenue Laws of the United States and particularly section 3475(a) of the Internal Revenue Code (R. 2), and that the amount involved is more than Three Thousand Dollars (\$3,000) and less than Ten Thousand Dollars (\$10,000) (R. 2); that Getchell Mine, Inc., is a corporation incorporated under the laws of the State of Nevada and is engaged in the business of operating a mining property known as the Getchell Mine in Humboldt County, Nevada, and that in the course of its mining operations appellant mines tungsten and gold ores and transports the same to its mill for treatment (R. 2). The complaint further alleges that on the 1st day of January, 1937, appellant entered into an oral contract with Dodge Construction, Inc., a Nevada corporation, to remove by the use of power shovels gold and tungsten ores from the mining properties operated by appellant and transport the same by truck to designated stockpiles or to the appellant's mill for treatment; that Dodge Construction, Inc., was paid sums ranging from 25¢ to \$1 per cubic yard, depending on the distance the ores were transported, which varied from 300 feet to 7 miles; that all of this transportation took place on the property of the appellant and on roads built and maintained by the appellant. It is further alleged that at no time during the performance of this oral contract was Dodge Construction, Inc. acting in the capacity of a common carrier or a contract carrier for hire (R. 3). It is also alleged that between the dates of December 1, 1942 (the effective date of section 3475(a) of the Internal Revenue Code) and up

to and including April 30, 1944, Dodge Construction, Inc. transported, under such contract, quantities of tungsten and gold ores and received payment from the appellant in the sum of \$166,787.31 (R. 3); that thereafter the Commissioner of Internal Revenue determined that a tax was due on the payments made to Dodge Construction, Inc. by the appellant at the rate of 3%, amounting to the sum of \$5,003.62, as shown by a letter from the Commissioner attached to the complaint and marked Exhibit A (R. 4-5); that the said amount of \$5,003.62 was thereafter assessed, together with interest amounting to \$1,105.11, which amount, with interest, was paid by appellant under protest and duress under date of March 2, 1946 (R. 4); that on or about July 1, 1946, appellant filed a claim for refund of said amount, a copy of said claim being attached to the complaint and marked Exhibit B (R. 4, R. 7); that this claim was denied by the Commissioner on October 2, 1946, by letter, a copy of the same being attached to the complaint and marked Exhibit C (R. 4, R. 10). In conclusion, the complaint alleges that the transportation taxes, under the provisions of section 3475(a) of the Internal Revenue Code have been illegally and erroneously collected, and that a refund thereof has been illegally and erroneously denied to appellant (R. 4), and that appellant demanded judgment against the appellee for the sum of \$6,108.73, together with interest thereon from the date of payment (R. 5).

In answer to this complaint, the United States of America, the appellee herein, filed an answer on May

7, 1947 (R. 13) and admitted all of the allegations contained in the appellant's complaint save and except that it alleged that it was without knowledge or information sufficient to form a belief as to whether or not Dodge Construction, Inc. was acting in the capacity of a common carrier or a contract carrier for hire at the time of the performance of said oral contract, and further denied that the sum of \$6,108.73 was paid under protest and duress on March 2, 1946, but does aver that this sum was paid by appellant on March 4, 1946, and denies that the said sum had been illegally and erroneously collected, and the appellee prayed that the appellant take nothing in this suit and that the complaint be dismissed and that costs expended be assessed against appellant (R. 14).

After a hearing on a stipulated statement of facts, judgment was entered on the 24th day of January, 1949, for the appellee and against the appellant (R. 21-25). Thereafter, a motion for a new trial was made by the appellant and said motion, on June 15, 1949, was denied (R. 28). On July 29, 1949, appellant filed a notice of appeal from the final judgment entered in this action on January 24, 1949 (R. 26-27).

The statutory provisions sustaining the jurisdiction of the District Court are contained in section 41 (20) of Title 28, United States Code, which provides, in substance, that the District Courts of the United States shall have jurisdiction to entertain a suit for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or col-

lected, if the claim does not exceed \$10,000; and said action arose under the Internal Revenue Laws of the United States and particularly section 3475(a) of the Internal Revenue Code, which provides, in substance, for a 3% tax on the transportation of property from one point in the United States to another.

This Court has jurisdiction on appeal by virtue of Judicial Code, section 128, as amended, USCA Title 28, section 225, which provides, in substance, that the courts of appeals shall have jurisdiction to review by appeal final decisions of the district courts except in cases directly reviewable by the United States Supreme Court. The appeal is taken from a final judgment and is not one of the class of cases directly reviewable by the United States Supreme Court.

STATEMENT OF THE CASE.

This appeal is from a judgment of the District Court of the United States, in and for the District of Nevada, made and entered on the 24th day of January, 1949, in favor of appellee and against appellant (R. 26). The action was tried before the court without a jury, upon a stipulated statement of facts (R. 14-17), said statement being as follows:

“1. This action is brought against the defendant by virtue of the provisions of Section 41 (20) of Title 28, United States Code, and arises under the Internal Revenue laws of the United States and particularly Section 3475(a) of the Internal Revenue Code. The amount involved is more than

the sum of Three Thousand Dollars (\$3,000.00) and less than the sum of Ten Thousand Dollars (\$10,000.00).

2. That Getchell Mine, Inc. is a corporation incorporated under and by virtue of the laws of the State of Nevada and engaged in the business of operating a mining property known as the 'Getchell Mine,' situated in the Potosi Mining District, Humboldt County, Nevada. In the course of its mining operations, plaintiff extracts and moves tungsten and gold ores from natural deposits in the earth to surface ground. The said ores must then be removed and transported to its mill for treatment. After January 1, 1937, and from December 1, 1942, to April 30, 1944, both inclusive, such ores were removed and transported as stated in Paragraph 3 following:

3. That on or about the 1st day of January, 1937, plaintiff entered into an oral contract with Dodge Construction, Inc., a Nevada corporation, whereby Dodge Construction, Inc. agreed to remove, by the use of power shovels, gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment. That for such removal and transportation, Dodge Construction, Inc. was paid sums ranging from 25¢ to \$1.00 per cubic yard, depending on the distance said ores were transported, which varied from 300 feet to 7 miles. That all of said transportation took place on private roads owned, built and maintained by plaintiff on properties acquired by plaintiff prior to 1937 and owned by plaintiff in fee simple, except that during part of the hauling of ores from the Granite

Creek Mine to the Gatchell mill the said ores were transported over a road built and maintained by plaintiff, for a distance of approximately one mile across the E $\frac{1}{2}$ of the E $\frac{1}{2}$ of Section 22, Township 38 North, Range 24 East, M.D.M., which said section is owned by the United States of America. Attached hereto and by reference made a part hereof is a map showing plaintiff's property and the roads traversing said property on which said transportation occurred. (Exhibit D) (R. 19)

4. That on and after December 1, 1942, the effective date of section 3475(a) of the Internal Revenue Code, and up to and including April 30, 1944, Dodge Construction Inc., transported under such contract divers quantities of tungsten and gold ores under the terms of the contract and received payment therefor from plaintiff in the sum of \$166,787.31. That in the performance of said contract and the transportation of said ores, Dodge Construction, Inc. was an independent contractor and was engaged in the business of transporting property for hire within the meaning of Section 3475, Title 26, United States Code, unless the facts stipulated in paragraph numbered 3 hereof establish that Dodge Construction, Inc. was not so engaged within the meaning of said Section.

5. That the Commissioner of Internal Revenue, as a result of a review of the circumstances surrounding the transportation of said ores, determined a tax due on the payments made to Dodge Construction, Inc. by plaintiff at the rate of three per cent (3%) of such payments and in an amount of \$5,003.62, as shown by a letter

from the Commissioner to the plaintiff, dated November 4, 1944, a copy of which letter is attached hereto as Exhibit A.

6. That the said amount of \$5,003.62 was thereafter duly and regularly assessed by the Commissioner of Internal Revenue, together with interest amounting to \$1,105.11, which amount with interest was paid by plaintiff on March 4, 1946.

7. That on or about July 1, 1946, the plaintiff filed a claim for refund of said transportation tax, a copy of which claim is attached hereto as Exhibit B. That said claim was denied by the Commissioner of Internal Revenue on October 2, 1946, by letter, a copy of which is attached hereto as Exhibit C."

The applicable statutes and regulations are section 3475(a) of the Internal Revenue Code, being 26 USCA, section 3475(a), which provides as follows:

"(a) Tax.—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express

company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.”

and Regulations 113, sections 143.1 and 143.11. Section 143.1 provides as follows:

“Meaning of terms.—As used in these regulations, unless otherwise specified or indicated by the context—

(a) General.—The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(b) Person engaged in the business of transporting property for hire.—The term ‘person engaged in the business of transporting property for hire’ includes a common carrier, contract carrier, local moving or drayage concern, freight forwarder, express company, or other person transporting property for hire wholly or in part by rail, motor vehicle, water, or air.

(c) Carrier.—The term ‘carrier’ is co-extensive with the term ‘person engaged in the business of transporting property for hire’.

(d) Transportation.—The term ‘transportation’ as used herein means the movement of prop-

erty by a person engaged in the business of transporting property for hire, including interstate, intrastate, and intra-city or other local movements, as well as towing, ferrying, switching, etc. In general, it includes accessorial services furnished in connection with a transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering livestock, and similar services and facilities.

(e) Property.—The term ‘property’ means any physical matter regardless of value over which the right of ownership or control may be exercised, including currency, documents, papers of all kind, etc.

(f) Coal.—The term ‘coal’ as used herein included anthracite, bituminous, semi-bituminous, sub-bituminous and lignite coal, coal dust, and coke and briquettes made from coal.

(g) Preparation plant.—The term ‘preparation plant’ means a plant operated in connection with mining operations at which coal is subjected to one or more processes, such as washing, crushing or sizing, intended to remove impurities or foreign matter or otherwise render the coal better suited for consumption, but not including a preparation plant operated as part of or in conjunction with any other establishment or place (such as a steel plant, coke oven, etc.) where coal is consumed as fuel or in the production of coke, briquettes, or other articles or materials.

(h) International Organization.—‘The term ‘international organization’, when used in relation to exemption from the tax, means any public international organization in which the United States participates pursuant to any treaty, or under authority of an Act of Congress authorizing such participation or making an appropriation therefor, and which has been designated by the President through an Executive order or orders as being entitled to enjoy the privileges, exemptions and immunities provided by the International Organizations Immunities Act, or part thereof including exemption from the tax, and the designation of which has not been revoked by the President, or the privileges, exemptions and immunities of which, or part thereof, including exemption from the tax, have not been withdrawn by the President by appropriate Executive order.’”

Section 143.11 provides as follows:

“Scope of tax.—Section 3475 (a) imposes a tax upon amounts paid within the United States after December 1, 1942, to a person engaged in the business of transporting property for hire, for transportation, originating on or after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another.”

Section 143.13 provides:

“Application of Tax.—(a) In general.—The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. (See section 143.50.)

The tax applies to the total amount paid within the United States for transportation of property from one point in the United States to another even though while en route part of the transportation movement is through a foreign country.

The tax applies to any payment, not specifically exempted, for the transportation of property, made to a person, engaged in the business of transporting property for hire, including a payment made by one such person to another, but not including an amount paid by a carrier, a freight forwarder, express company, or similar person for transportation with respect to which a tax is payable to such person.

The tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

In the case of property transported from a point without the United States to a point within the United States the tax applies to any amount paid within the United States for that part of the transportation which takes place within the United States.

Where the amount paid in the United States covers the entire movement of property from point of origin in a foreign country to an inland point in the United States, the tax will apply to the pro rata part of such payment which represents transportation within the United States. However, in the case of shipments of foreign origin arriving by water, no tax will attach to

transportation or services performed prior to the unloading of property at the port of first arrival.

The tax does not apply: (1) to an amount paid outside the United States for the transportation of property from a point without the United States to a point within the United States; (2) to an amount paid by a carrier, freight forwarder, express company or similar person for the transportation of property with respect to which a tax is payable to such carrier, freight forwarder, express company or similar person; (3) to an amount paid for the transportation of property in course of exportation or shipment to a possession of the United States and actually so exported or shipped (see section 143.30). For governmental exemptions see Subpart D.

(b) Coal.—An amount paid after December 1, 1942, with respect to the first transportation for hire originating on or after that date of coal is subject to tax, except that an amount paid for the transportation of coal from the mine to a preparation plant as defined in section 143.1 (g) is not taxable, but the tax attaches to the first subsequent transportation for hire of the coal.

An amount paid for the transportation of coke or briquettes made from coal is not subject to tax, provided there has been a previous taxable transportation of the coal or coal dust from which such coke or briquettes were manufactured.

When a person delivers to a carrier a quantity of coal for a transportation movement, and the transportation tax has previously been paid with respect to the coal so delivered, a statement to that effect shall be endorsed on the bill of lading

or other shipping papers. This endorsement shall constitute authority to the carrier not to collect tax with respect to the transportation charges due on such shipment.”

The question presented by the facts so stipulated and by the applicable statutes and regulations is: (a) whether or not the operations of Dodge Construction, Inc. on the Getchell Mine properties, under the terms of its oral contract with appellant constituted transportation of property within the meaning of section 3475(a); and (b) if they do constitute transportation of property whether or not such transportation within the confines of the appellant's properties is the transportation of property from one point in the United States to another.

**SPECIFICATION OF ERRORS INTENDED TO BE
URGED UPON APPEAL.**

The following is a statement of the specifications of error upon which appellant intends to rely upon in this appeal:

1. The court erred in finding that Dodge Construction, Inc. was engaged in the business of transporting property for hire within the meaning of section 3475, Title 26, United States Code, in the performance of its contract with appellant.

2. The court erred in not finding that the movement of gold and tungsten ores from the mine to the mill over private roads owned, built and maintained

by appellant on properties owned by appellant, with the exception of a haulage of one mile over land owned by the United States, was not transportation from one point in the United States to another.

3. The court erred in not finding that the operations of Dodge Construction, Inc., whereby it removed gold and tungsten ores from appellant's properties and transported the same to stockpiles or to the Getchell mill for treatment, were a part of the mining operations carried on by appellant, and that such movement of property as took place was merely incidental to the mining operations carried on by appellant.

4. The court erred in concluding from its findings that there was transportation of property by Dodge Construction, Inc., within the meaning of section 3475 of the Internal Revenue Code and the Regulations thereunder.

5. The court erred in concluding from its findings that the tax levied and assessed under section 3475 of the Internal Revenue Code was legally assessed and collected.

ARGUMENT.

The argument herein made will refer directly to all five specifications hereinabove made. Inasmuch as the entire argument of appellant goes to all five assignments of error, the appellant will not specifically refer to each separate assignment as a specific point in that argument.

The question presented to the court is whether or not Dodge Construction, Inc. was engaged in the transportation of property within the meaning of section 3475(a) and that if it was engaged in such transportation whether or not such transportation, made within the confines of appellant's properties, was transportation of property from one point in the United States to another within the meaning of section 3475(a).

I.

The first question to be determined is whether or not the operations of Dodge Construction, Inc., under its oral contract with appellant, did or did not constitute the transportation of property. It is appellant's contention that this did not constitute transportation of property but was merely a part of and incidental to the mining operations carried on by appellant.

Under the terms of its contract with appellant, Dodge Construction, Inc. was required to remove tungsten and gold ores by the use of power shovels from the mining properties operated by appellant and transport the same by truck to designated stockpiles or to the mill of appellant for treatment. All of these operations by Dodge took place on the premises of appellant with the exception of a haul of approximately 1 mile over land owned by the United States. These operations by Dodge were essentially a part of the mining business carried on by appellant. This business was not merely the removal of tungsten and

gold ores from the earth but the milling and treatment of those ores. The removal from the earth and the transportation to the mill were a part and parcel of the production by appellant of a final product designed for sale. In the case of

In re Rollins Gold & Silver Mining Co. (District Court, Southern District New York)
102 Fed. 982

the court defines "mining" as follows:

"This definition is certainly going very much further than the ordinary acceptation of the term, but even in this view the industries excepted are 'fishing, hunting, and mining, and mining and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature,' which would include the industry of milling and reducing ore. Mining and milling would seem to be, taken together, one industry, having for its object 'to obtain possession of material products in the state in which they were fashioned by nature.' Mining, the process of extracting from the earth the rough ore, would seem to be the first step in the process, milling or reducing the second step, to wit: the further separating of the materials found together, the one from the other, and extracting from the mass the particular natural product desired."

"Transportation" is defined by the Supreme Court of the United States in the case of

Gloucester Ferry Co. v. Commonwealth of Pennsylvania, 114 U.S. 196 at 199, 29 L. ed. 158 at 162

as follows:

“Transportation implies the taking up of persons or property at some point and putting it down at another.”

A situation analogous to that of the case at bar arose under section 3460 of the Internal Revenue Code providing for a $4\frac{1}{2}\%$ tax upon amounts paid for transportation of oil by pipeline, the principal case being that of

Alexander v. Carter Oil Co., 53 Fed. (2d) 964,
C.C.A. 10

which was an action by the Carter Oil Company against the Collector of Internal Revenue to recover taxes paid for the transportation of oil by pipeline. The oil company was engaged in the production and sale of oil but not in the business of refining. It owned certain producing leases on which the pipeline facilities were inadequate to carry the production from the field and it was accordingly necessary for the company to construct storage tanks to conserve the oil it was producing and in which to hold the oil until prices were better. It was not practicable to erect the tanks on the producing leases themselves so the company acquired title to certain land 4 miles from the closest and 12 miles from the farthest producing well on which it constructed the storage tanks and to which it piped the oil from the producing wells. A tax of $4\frac{1}{2}\%$ of the transportation charge from the well to the storage tanks was assessed by the Collector of Internal Revenue. The sole question before the court was whether or not the movement from the wells to the storage tanks was a “transportation”.

tation of oil by pipeline'' within the meaning of section 3460. The court, in holding that the movement of the oil from the well to the storage tanks was local and incidental to the business of producing oil and that it was not transportation, said, at page 966:

''There are four phases of the oil business: Production of crude oil; transportation; refining; and marketing of the refined product. Congress has singled out the phase of 'transportation' for taxation. Is the movement from the wells to storage tanks a part of production, or is it a part of transportation? It is possible for oil to go directly from the mouth of the well to the refinery; if so, transportation begins at the mouth of the well. Or, it may go to flow or settling tanks, and from thence to market. If so, transportation begins when it leaves the flow or settling tanks. More often it must go to storage tanks where it is held until it can be gauged and until pipe line facilities to the refinery are available, or until the market suits the producer. It is quite true that generally such storage tanks are small and on the lease, in which case we understand counsel to concede that the movement into storage is not and should not be taxed. Does it make a difference if the storage tanks are large or are not on the lease? These are circumstances to consider in determining whether the storage is, in good faith, a part of production, or whether it is an incident to transportation. If the appellee had constructed these large tanks a hundred miles from the leases, or near a refinery, clearly the movement to the tanks would be a part of transportation to market. The question is primarily one of fact. Oil moves, through pipes in the

process of its production, a movement that is conceded not to be a taxable 'transportation'. Was the movement in this case really and in good faith a part of the business of production, or was it a part of the 'transportation' contemplated by Congress? The appellee's tanks were located as nearly as practicable to the leases; the cost of transportation to market was not decreased a penny by their location; the parties have stipulated that the 'function of the facilities' was to enable the oil to be stored in the vicinity of the leases; the trial court has held that the movement into storage was a part of the business of production, and not a part of its transportation to market. There is nothing in the record that enables us to hold that such a finding is without substantial support in the evidence."

It is equally true in the present case that the removal and movement of the raw tungsten and gold ores from the mining properties of appellant to the mill or to stockpiles, where the ores are stored until they can be treated, is a movement from one unit of the business of producing gold and tungsten to another unit of the same business and is a part of and incidental to the business of production of gold and tungsten concentrates and not a part of its transportation to market within the purview of section 3475(a).

To the same effect is the case of

Jones v. Continental Oil Co., 141 Fed. (2d) 923,
C.C.A. 10

which was an action by the Continental Oil Company against the United States to recover a tax imposed

upon the transportation of crude oil by pipeline. The oil company was engaged in operating a number of producing oil leases in two fields. The oil was piped from the producing wells to stabilization plants where hydrocarbon gases were removed and saved, and from the stabilization plants to storage tanks. It was this movement of the oil from the well mouth to the stabilization plant which was contended by the United States to be a taxable transportation under the provisions of section 3460 of the Internal Revenue Code. In holding that the movement from the well to the stabilization plant was not transportation such as to be taxable under the Code but was incidental to the production of oil, the court said, at page 925:

“The test to be applied in the determination of the taxability is not in dispute. The tax is ‘* * * imposed upon all transportation of crude petroleum * * * by pipe-line.’ Treasury Regulations 42, Article 26, defines ‘all transportation by pipe-line’ as including transportation by a private owner whenever the movement is substantially similar to movements which pipe-line carriers usually undertake and perform, if such movement is not merely local or incidental to the business of producing or refining oil. That if the movement is from wells to flow or storage tanks situated in the immediate vicinity, the movement is not such as a pipe-line carrier would normally render, and consequently is not subject to the tax, but the movement by pipe-line from the lease storage tanks to storage tanks usually maintained at receiving stations on the end of a ‘stem’ or gathering line, is subject to the tax.”

It is interesting to note that as a result of these two decisions Congress in 1942 adopted an amendment to section 3460 of the Internal Revenue Code, being section 3460(c), by which it expressly exempted intra-industry movements by pipeline from the transportation tax imposed by the section.

In the case of

Louisiana & Pacific Railway Co. v. United States, 209 Fed. 244, Affirmed 234 U.S. 1 (Commerce Court)

the Commerce Court makes a clear distinction between the movement of goods which is industrial and that which is transportation as such. The court said, at page 257:

“Nor may the line be drawn on the basis of what is and what is not essential to the industry. Transportation would not flourish without manufacturing; manufacturing could not be successfully carried on without transportation; they are distinct activities; but both are essential to the industry. Raw materials must be brought to and the finished product must be carried from the mill; whether any particular service involving an actual hauling of the goods is transportation or industrial depends upon whether, on the one hand, it is an interindustry act, a step in the manufacturing process, or, on the other hand, a movement of raw material from without to the mill or of finished product from the mill toward the market. Every actual carrying of each part of the material or product is, of course, not a transportation service. The Crane Iron Works Case, *supra*, well illustrates this. In that case,

as in other cases therein cited (General Electric Co. v. N.Y.C. & H.R. R. R. Co., 14 Interst. Com. Com'n R. 237; Solvay Process Co. v. D. L. & W. R. R. Co., 14 Interst. Com. Com'n R. 246), it was held that the hauling between buildings of an extensive plant was a part of the manufacturing, not of the transportation operations; that the transportation ended, as to raw materials, when the common carrier had performed all that it could have been required to perform and all that it did for nonproprietary mills, that is, when it made delivery at some point on the plant; that any further activity on the part of the tap line common carrier within the plant itself could not have been compelled and was not a transportation service for which the trunk line could pay either an allowance to the industry or a division of the joint rate to the tap line as a common carrier."

It is clear that in the present case the operations of Dodge in the removal and hauling of the ores to the mill were an interindustry act and a step in the manufacturing process and not transportation as such.

It was not within the purview of Congress in the enactment of section 3475(a) that all movements of property should be taxed. This is clearly indicated by the language contained in the section that the tax shall apply only to amounts paid to a person "engaged in the business of transporting property for hire", in other words, amounts paid to common carriers in general. It would appear to be the intent of Congress, by the use of this language, to tax transportation which is essentially a movement of property

in commerce, a movement of property to or from a market, and not movements of property which are basically a part of the production of goods for commerce and for market. There is nothing in the statute which would indicate an intent on the part of Congress to tax movements of property solely upon one's own premises in the course of one's industrial operations.

As pointed out by the court in *Alexander v. Carter Oil Company*, supra, the operations carried on by Dodge Construction, Inc. were not a movement of property which would ordinarily be undertaken by a common carrier for hire, and the test would seem to be, under the decision in that case, whether or not the hauling was one which a common carrier for hire would undertake in the usual course of its business. It cannot be said that Dodge was engaged in the business of transporting property for hire in carrying out the terms of its contract with Getchell. This contract required it not only to haul ores from the mine to the mill but to actually mine the ores themselves by means of power shovels. The removal and the hauling of these ores are inseparable and do not constitute "transportation" within the purview of section 3475(a).

An examination of the regulations, and particularly section 143.13, supra, reveals that the Treasury Department has itself created an exemption from the tax on transportation in the case of transportation of coal from the mine to a preparation plant. No such

exemption of coal from the tax is provided for by section 3475(a). That section simply makes the tax on coal 4¢ per short ton instead of 3% of the amount paid, and provides that it shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation. The Treasury Department has, accordingly, created an exemption in favor of the coal industry which it now refuses to apply to other branches of the mining industry. No more reason exists for the taxation of transportation of raw ores from a mine to a mill all located on the same premises than exists in the taxation of the movement of coal from the mine to a preparation plant.

II.

The second and last question to be determined on this appeal is whether or not the hauling of crude ores from the mine to the mill or to the stockpiles, all of which took place on the premises of appellant, was transportation from one point in the United States to another.

THE HAULING OF CRUDE ORES FROM THE MINE TO THE MILL, ALL OF WHICH TOOK PLACE ON THE PREMISES OF APPELLANT WAS NOT TRANSPORTATION FROM ONE POINT IN THE UNITED STATES TO ANOTHER.

Webster defines "point" as follows:

"A place having definite position but no extent in space; a place considered as to its position only; a spot; a geographical place or situation; a locality; as, a good point from which to start."

Under this definition, transportation from one point in the United States to another is transportation from one place in the United States to another since the words "point" and "place" are synonymous.

In the case of

Hammell v. State, 152 N.E. 161 (Indiana)

the court had occasion to define the word "place" in construing a statute of Indiana prohibiting the transportation of intoxicating liquor from one place to another. The court said, at page 163:

"The word 'place' is defined as 'an area or portion of land marked off or regarded as marked off or separated from the rest, as by occupancy, use, or character'; and the word 'another'—different; distinct. Century Dictionary. 'Place'—a portion of space regarded as separate from the rest of space; 'another'—not the same, different. Imperial Dictionary. 'Place'—space occupied by or belonging to a thing under consideration; space regarded as abode or quarters. 'Another'—not the same; distinct; different. Standard Dictionary. 'Place'—any portion of space regarded as measured off or distinct from all other space or as appropriated to some definite object

or use. 'Another'—one more, in addition to a former number; a second or additional one; not the same; different.

If we accept the definitions of Webster and of the other dictionaries referred to in *Hammell v. State*, supra, it is apparent that the Getchell Mine was itself "an area or portion of land marked off or regarded as marked off or separated from the rest as by occupancy, use or connection". We must, likewise, under such definitions consider the Getchell Mine as a "portion or space regarded as measured off or distinct from all other space or as appropriated to some definite object or situation". The Getchell Mine was, therefore, a place or point and all of the transportation by Dodge occurred within the confines of a single place, point or locality and there was no transportation from one point in the United States to another.

In the case of

Charles M. Lyle v. United States, 76 Fed.

Supp. 787, Decided February 2, 1948

which is a case greatly similar on its facts to the case at bar, it was there held by the court that an operation of this type presented none of the elements of transportation, as that term is generally understood, and that, consequently, the transportation tax was erroneously imposed. This case appears to be the only case decided under section 3475(a) that is similar on its facts to the case at bar. This case involved an action by the plaintiff to recover from the United States the 3% transportation tax paid to the Collector of Internal Revenue. The plaintiff was engaged

in the business of constructing airfields at Tifton, Georgia and Dublin, Georgia, and as a part of and incidental to the grading and leveling of such airfield, the plaintiff employed a subcontractor who furnished trucks to receive earth from the grading shovels and to move it to the dump or fill, all of the operations of the subcontractor and the hauling of the earth being within the confines of the airport under construction. The plaintiff paid the trucking subcontractor at the rate of \$2.75 per hour per truck, and a total of \$38,195.47. The Commissioner of Internal Revenue assessed 3% of the amount paid the subcontractor as representing a transportation tax due under section 3475(a). A claim for refund was denied, and this action was brought. In giving judgment for the plaintiff and holding that this was not taxable transportation, the District Court said:

“The transactions as set forth in the findings of fact did not constitute transportation of property from one point in the United States to another, within the meaning of Section 3475 of the Internal Revenue Code, and the payment of an hourly rental for dump trucks used only within the confines of the airfield being leveled, and as an incident of the grading and leveling of such airfield, was not a payment for the transportation of property within the terms of the statute just cited. Neither the statute, nor the regulations issued pursuant thereto, either expressly or by fair implication, evidence any applicability to transactions of the kind now under consideration, but, on the contrary, evidence intent to subject to tax liability payments made for transportation

in the manner and by the means specified as the language employed is commonly understood in the light of present day transportation practices and customs. The hauling of dirt by dump trucks hired upon an hourly basis, which are used exclusively in the leveling of an airfield, and within its confines only, presents none of the elements of transportation as that term is generally understood.

While the construction of the statute by the Commissioner of Internal Revenue is entitled to weight, in this case his determination does not appear correct to this Court.

The Complainant is entitled to recover, as prayed, the taxes paid under protest, and judgment therefor may be presented after notice.” (Italics ours.)

The United States Court of Appeals for the Second Circuit in

Bridge Auto Renting Corporation v. Pedrick,
174 Fed. (2d) 733 at page 738

in commenting upon the case of *Lyle v. United States*, supra, said:

“*Lyle v. United States* (supra) dealt only with the removal of dirt by a sub-contractor within the limits of an airfield under construction and such ‘transportation’ seems plainly outside the statute and regulations.”

This last cited case was decided on May 10, 1949, and while deciding against the taxpayer did, in effect, approve the decision in the *Lyle* case, this case being very closely analogous to the case at bar.

The determination of what was transportation from one point to another often arose under the Prohibition Acts of the various states during the Prohibition era. Many arrests were made for removal of liquor within the confines of a single building or across the premises of a single owner. This was almost universally held to be not transportation from place to place or from one point to another under those statutes. The leading case was that of

Commonwealth v. Waters, 77 Mas. 81

where the court said at page 84:

“‘From place to place’, as used in Statutes 1855, Chapter 215, section 20, prohibiting the transportation of spirituous liquors from place to place in the state, does not mean only from town or counties, or such other territorial divisions or districts as have been or may be established by a law or by authority of the Commonwealth. It is not every possible removal of spirituous liquors which comes within the statute. If the removal were only on the premises of the owner, or from one to another of his warehouses, or were from one to another part of his shop, it would not be from place to place within the meaning of the statute.”

This case was followed and cited in

Ready v. State, 290 S.W. 98 (Tenn.);

Miller v. State, 27 S.W. (2d) 803 (Texas);

England v. State, 8 Pac. (2d) 690 (Okla.).

CONCLUSION.

The plaintiff respectfully submits that there was no transportation of property by Dodge Construction, Inc. within the meaning of section 3475(a) of the Internal Revenue Code or the Regulations thereunder, and that there was no transportation of property from one point in the United States to another within the purview of that statute, and that, accordingly, the tax assessed and collected was illegally and erroneously assessed and collected, and that plaintiff should recover judgment from the United States in the amount of such tax with interest thereon.

It is submitted that the decision and judgment of the District Court of the United States, in and for the District of Nevada, should be reversed.

Dated, Reno, Nevada,
December 5, 1949.

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